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An Examination of University Speech Codes' Constitutionality and Their Impact on High-Level Discourse

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AN EXAMINATION OF UNIVERSITY SPEECH CODES' CONSTITUTIONALITY AND THEIR IMPACT ON HIGH-LEVEL DISCOURSE

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The First Amendment – which guarantees the right to freedom of religion, of the press, to assemble, and petition to the government for redress of grievances – is under attack at institutions of higher learning in the United States of America. Beginning in the late 1980s, universities have crafted "speech codes" or "codes of conduct" that prohibit on campus certain forms of expression that would otherwise be constitutionally guaranteed. Examples of such polices could include prohibiting "telling a joke that conveys sexism," or "content that may negatively affect an individual's self-esteem." Despite the alarming number of institutions that employ such policies, administrative and student attitude toward repeal or ensuring their free-speech rights are intact is arguably lax. Some scholars even suggest that colleges' prohibitions are welcome, and are a product of a generation of students rejecting the tolerance of hate speech. Court cases and precedent disagree, though, and various prominent rulings are discussed that have shaped the landscape of conduct codes in today's academia. Also described are examples and outcomes of academic prosecution of students by school officials for constitutionally protected speech, opinion, expression or conduct. More research is imperative before occurrence of a culture shift that eradicates expression and topics of discussion and criminally prosecutes speech outside of the talking points of an ivory tower echo chamber of approved opinions.

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Chapter One – A BRIEF HISTORY, DEFINITIONS AND LITERATURE REVIEW OF UNIVERSITY SPEECH CODES.

American tradition holds that freedom of speech is the cornerstone of intellectual discourse. Theoretically, no other place or establishment should be more committed to the concept and promotion of intellectual discourse than an institution of higher learning. The United States of America offers protection to the moral and ethical freedoms of debate and open conversation with the First Amendment to the Constitution, which explicitly states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

But why is freedom of speech so important? In his 1859 "On Liberty," considered one of the most authoritative texts on free speech, John Stuart Mill rests its essentiality on one vital fact: All opinions must be protected because anyone could be wrong. Mill also argues that even when we're right, the allowance and consideration of alternate viewpoints can refine our own beliefs and recognize in detail specifically why we believe the way we do. In short, any argument may hold a kernel of truth, but even without that, our beliefs can still be strengthened.[1]

No discussion of the First Amendment would be complete without two notable quotes from U.S. Supreme Court Justice Oliver Wendell Holmes, who wrote both that, "The best test of truth is the power of the thought to get itself accepted in the competition of the market"[2] and that "if there is any principle of the Constitution that more

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[1] Mill, J.S. (1859) *On Liberty*. New York: Penguin Classics, repr. 1995)
[2] *Abrams v. United States*, 250 U.S. 616, 630, (1919) (Holmes, J., dissenting)

imperatively calls for attachment than any other, it is the principle of free thought - not free thought for those who agree with us but freedom for the thought that we hate."[3]

Despite the First Amendment's clarity, both at face value and from courtroom interpretation, a majority of universities in the United States still cling to restrictions and codes on speech that violate constitutional principles, seemingly without regard for speech-chilling ramifications or the possibility that such codes teach the nation's future leaders that censorship is a positive quality. Because more Americans either hold or are pursuing a college degree than ever before, understanding of individuals' rights is crucial to future deliberation.[4]

Indeed, the concept of "free speech" is arguably taught as the enemy of social progress –instead of as something that is fundamental to learning. Greg Lukianoff, president of the Foundation for Individual Rights in Education (FIRE), which will be discussed shortly, writes in "Unlearning Liberty":

> I remember telling a New York University film student that I worked for free speech on campus and being shocked by his response: 'Oh, so you're like the people who want the KKK on campus.' In his mind, protecting free speech was apparently synonymous with advocating hatred.[5]

This attitude from young adults quickly bleeds into the dialogue of the nation, and potentially could alter the way discussion is executed.

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[3] *United States v. Schwimmer*, 279 U.S. 644 (1929)
[4] Derek Quizon, "Increasing Share of Adults Have College Degrees, Census Bureau Finds," *Chronicle of Higher Education*, April 26, 2011
[5] Lukianoff, G. (2012) *Unlearning liberty: Campus censorship and the end of American debate*. New York: Encounter Books. Loc: 207

Interestingly, however, since the inception of various speech codes in American universities in the late 1980s and '90s[6], research suggests that campus administrators are overstepping their bounds in facilitating civil discourse and are violating the First Amendment in the process. While likely well-intentioned, university speech codes chill free speech by threatening punishment or censorship for offenses as vague as "any action that is motivated by bias"[7] or as blatantly unconstitutional as a ban on "sexually, ethnically, racially, or religiously offensive messages."[8] Of course, as with all First Amendment discourse, administrators at public colleges have the ability to place time, place, and manner restrictions on some speech if the restrictions are, according to *Ward v. Rock Against Racism*, content neutral, narrowly tailored, serve a significant governmental interest, and leave open ample alternative channels for communication.[9] For example, a protest cannot substantially restrict the day-to-day functionality of a university, wherein students prevent others from attending class or take over an administrative building.

Demonstrations on university campuses are nothing unique to the last couple decades; anti-war protests – in which many were punished by administrations and law enforcement for both speech and action – were frequent during the Vietnam War era. Ironically, many university administrators today were attending institutions of higher learning in the era when free-speech concerns dominated campus.[10] Perhaps this is a result in the shift of the political spectrum; since the late 1980s, censorship on campus

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[6] The Foundation for Individual Rights in Education. *Spotlight on Speech Codes 2013*. Philadelphia: The Foundation for Individual Rights in Education, 2013. PDF. p.6

[7] University of Northern Colorado. Housing and Residential Education Handbook (2010). Greeley, CO. p. 46.

[8] Syracuse University. "Computing and Electronic Communications Policy" (2000). n. pag. Web. 01 Dec. 2013.

[9] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)

[10] Garry, P. M. (1995). Censorship by the free-speech generation. National Forum, 75(2), 29.

has often been treated as a "conservative issue" because the opinions most likely to be stifled at universities generally align with a socially conservative belief system. Simply put, a student is more likely to be punished by administration for opposing gay marriage, abortion and affirmative action than he or she is for supporting these topics. This situation will become evident during the examination of individual punishment cases in the following chapters. Typical censorship scenarios are not always based on political ideology specifically, though one study shows other factors may go hand in hand. Christians, who are typically cast as having more socially "conservative" values, are the only group that a majority of faculty were comfortable to admit evoked strong negative feelings in them, according to a 2007 study of attitudes on religion by the Institute for Jewish and Community Research. The survey found that Jews and Buddhists were most commonly favored by faculty, followed by Muslims. Mormons also tended to receive fairly negative reviews.[11]

The consequences of censoring opinions more typical of one side of the political spectrum is a great cause for concern – though not exactly surprising – in today's political climate. Extensive studies have shown that the weight of America's growing political polarization is more increased than in eras past, as technology has advanced to the point where individuals are able to intake content through cyber environments wherein likeminded people confirm pre-existing opinions, causing an echo chamber that leaves no room for new thoughts and ideas.[12] Sociologist Diana C. Mutz has confirmed this in her studies, writing that those with the highest level of education have the lowest

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[11] Tobin, G.A., and Weinberg, A.K. (2007). *Profiles of the American University,* vol. 2, *Religious Beliefs and Behavior of College Faculty.* San Francisco: Institute for Jewish and Community Research, 2007

[12] Bishop, Bill. (2008) *The big sort: Why the clustering of like-minded America is tearing us apart.* New York: Houghton Mifflin.

levels of exposure to people with viewpoints in opposition to their own. Conversely, those who have not even graduated from high school are subjected to the largest amount of differing viewpoints and diverse discussion.[13]

Perhaps, though, the belief in censorship isn't indoctrinated in college but before; of 100,000 high school students surveyed by the John S. and James L. Knight Foundation in 2004, 73 percent either felt ambivalent about the First Amendment or took it for granted.[14] In "Academically Adrift," Richard Arum and Josipa Roksa found that 45 percent of students show almost no improvement in "critical thinking, analytical reasoning, problem solving and writing," during their time in college. They also found that very few students knew how to "make" or "break" an argument. Students in schools of education and social work showed the lowest improvement in critical-thinking skills, with business students not far behind. Those in the math and science fields showed greatest improvement.[15]

Greg Lukianoff surmises that professors and administrators in departments of social work and education are most likely to attempt to indoctrinate their students – or at least encourage them in the same manners of thinking – and hence retard their ability to think critically. "And if that is the case for those we are training to teach the next generation, the prospects for future generations appreciating the rigorous philosophy of free speech and free minds are bleak indeed," Lukianoff writes.[16]

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[13] Mutz, D.C. (2006). *Hearing the Other Side: Deliberative versus Participatory Democracy.* Cambridge: Cambridge University Press, 2006

[14] Yalof, D., and Dautrich, K. (2004). *Future of the First Amendment 2004,* John S. and James L. Knight Foundation, p. 3, http://www.knightfoundation.org/publications/future-first-amendment-2004

[15] Arum, R. and Roksa, J. (2011). *Academically Adrift: Limited Learning on College Campuses.* Chicago: University of Chicago Press.

[16] Lukianoff, G. *Unlearning Liberty*. Loc: 3706

One of the foremost organizations defending First Amendment rights on university campuses is the Foundation for Individual Rights in Education (FIRE). FIRE defines speech codes as, "[A]ny university regulation or policy that prohibits expression that would be protected by the First Amendment in society at large. Any policy—such as a harassment policy, a student conduct code, or a posting policy—can be a speech code if it prohibits protected speech or expression."[17] Each year, FIRE releases a comprehensive study that grades universities' speech policies. FIRE awards three classifications to universities based on the following criteria:

1. Red Light - A red-light institution is one that has at least one policy that both clearly and substantially restricts freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access.
2. Yellow Light - A yellow-light institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, affect only narrow categories of speech.
3. Green Light – If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a green light. A green light does not necessarily mean that a school actively supports free expression; it simply means that the school's written policies do not pose a serious threat to free speech.[18]

In the "Spotlight on Speech Codes 2013," FIRE rated 305 public institutions and 104 private institutions (409 total); 62.1 percent received a Red Light ranking, 32 percent a Yellow Light ranking and only 3.7 percent a Green Light rating. Nine schools (2.2

[17] "What Are Speech Codes?" *Thefire.org*. The Foundation for Individual Rights in Education, n.d. Web. 8 Dec. 2013.
[18] The Foundation for Individual Rights in Education. *Spotlight on Speech Codes 2013.* p. 3-4

percent) were not ranked, as they had consistently expressed their own standards that hold its members above a commitment of free speech (military institutions, for example, qualify under this section)[19]. This means that an alarming 94.1 percent of surveyed universities – most of which are among the largest in the nation – have speech codes FIRE found in violation of the First Amendment, theoretically allowing university administrators to dole out punishments for speech at their subjective discretion. The good news, however, is that the number of Red Light universities has dropped 12.9 percent from its 75 percent amount five years ago.[20]

FIRE is not the only group claiming that unpopular opinions are under siege in the academic environment. In 2010, the Association of American Colleges found in a study of 24,000 students that only about 30 percent of college seniors agreed strongly with the statement: "It is safe to have unpopular views on campus." Only 16.7 percent of faculty – those who typically understand the academic system the best and who have been around the longest – agreed with that statement. [21]

The first prominent speech code to be struck down in court was the University of Michigan's "Policy on Discrimination and Discriminatory Harassment of Students in the University Environment" in the 1989 case Doe v. University of Michigan.[22] Like other universities, Michigan adopted a speech code in 1988 after a series of efforts to quell and discourage racism, homophobia, sexism, and other alleged persecutions of minority

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[19] *Ibid.* p.5-6
[20] *Ibid.*
[21] Dey, E.L., Ott, M.C., Antonaros, M., Barnhard, C.L., and Holsapple, M.A. (2010) *Engaging Diverse Viewpoints: What Is the Campus Climate for Perspective-Taking?* Washington, D.C.: Association of American Colleges and Universities, 2010, available online.
[22] Doe v. Michigan. 721 F. Supp. 852 (E.D. Mich 1989).

groups. While on campus, students could be punished for displaying the following behaviors:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status….
2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation….[23]

An accompanying guide soon followed the policy, which provided an example of sanctionable behaviors and conduct qualifying as "harassment," which included:

1. A male student makes remarks in class like "Women just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
2. Male students leave pornographic pictures and jokes on the desk of a female graduate student.
3. You display a confederate flag on the door of your room in the residence hall.
4. You laugh at a joke about someone in your class who stutters.[24]

A psychology graduate student, known in the court report as John Doe, challenged the policy, arguing that the policy would effectively ban classroom discussions about the biological differences between men and women. Michigan responded by saying that "legitimate" ideas were not sanctionable, effectively relegating to administrators the arbitrary definition of legitimacy. The university argued that First Amendment freedoms would not be violated despite the policy, although evidence that

[23] *Ibid.*
[24] *Ibid.*

the school prosecuted multiple students existed, including a graduate student for expressing an opinion involving homosexuality as a curable disease in the context of academia. Because of these reasons as well as the policy's overbroad qualities and vagueness, the Eastern District Court of Michigan ruled the university's policy unconstitutional.[25] Additional cases in the courts deciding university speech codes will be discussed in a further chapter.

The most recent – and likely, most appalling – federal act occurred in May 2013, when the U.S. Departments of Justice and Education sent a letter (referred to as a "blueprint" in its content) to the University of Montana addressing the school's handling of sexual harassment claims. The blueprint argued for a more "broadly defined" definition of sexual assault to include "any unwelcome conduct of a sexual nature."[26] With this letter, the federal government has potentially labeled a vast majority of college students as sexual harassment perpetrators with definitions that seemingly target male students. This document is also seemingly a completely turnaround from a 2003 open letter titled "Dear Colleague" from the Department of Education's Office for Civil Rights. Around that time, the abuse by universities of harassment codes became so rampant the OCR had to issue a statement that reminded administrators that, "No OCR regulation should be interpreted to impinge upon the rights protected under the Frist Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights" and stated that punishment for free speech, "[M]ust

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[25] *Ibid*

[26] Bhargava, Anurima, and Gary Jackson. "Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001." Letter to Royce Engstram, Lucy France (University of Montana). 9 May 2013.

include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive."[27]

Simply put, university administration in some capacity is generally responsible for creating most incidents of censorship, though the exact reasons may vary. Ironically, for example, when a code is in place to prevent bullying or harassment, administrators have been found to use that code to punish those who have spoken out against, mocked or criticized them. This theory leaves open the possibility for students to be tricked into supporting rules that ultimately only protect those in power. In "Kindly Inquisitors," Jonathan Rauch compares many speech code policies and their enforcement to fundamentalism and former rulers who dominated by persecuting those whose ideas were different based on the rulers' own interpretation of the truth: Islamic theocrats, Egyptian pharaohs, Chinese emperors, divine-right kings of Europe, the head priests of the Mayans, Josef Stalin and Adolf Hitler. Fundamentalist systems traditionally have been characterized as punishing or destroying people in defense of calcified ideas.[28] The parallels between these systems and the speech code discussion is somewhat alarming, though perhaps extreme.

Another reason often given for censorship at universities is the overriding goal of making everyone feel comfortable. Comfortable minds are not thinking minds, however, and the core of this rationale is one often made an afterthought. One's feelings or emotions are not substantial enough to qualify as a serious argument, but rather a

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[27] U.S. Department of Education, Assistant Secretary. "Dear Colleague." Letter. 28 July 2003. U.S. Department of Education, n.d. Web. <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>.
[28] Rauch, J. (1995). *Kindly Inquisitors: The new attacks on free thought*. Chicago: University of Chicago Press.

subjective state one can control or choose to ignore. As being offended is an emotional state, it is insufficient to use an excuse to stifle debate.[29]

As these rationale and further examples will show, university administrators are blatantly inconsistent with applying speech codes. Many codes are so broad that a large body of students and faculty could be found guilty of infractions multiple times a day. Of course, expulsion en masse of students across the country for making jokes would cause an uproar, so I don't of punishing unpopular, unwanted or critical speech.

But what's the harm in these codes, then, if they are simply "on the books" as a deterrent to potentially hurtful speech? They create a chilling effect, for one, wherein people will abstain from speech they know could cause controversy or be punished. Students will refrain from raising serious discussion topics around anyone but like-minded people, creating a polarized environment where everyone's intellectual growth is stifled. They also miseducate students about free speech, their rights, the rights of others, and what it means to live in a pluralist democracy.[30] Opponents may devise nightmare scenarios for examples, citing minority students being chased off campus by an angry mob of racists. These are usually examples of action not speech and action is not constitutionally protected to begin with.

A financial burden is also to be considered when dealing with First Amendment rights on campus. In the state of our litigious society, universities look to find a low-risk balance between harassment and free-speech lawsuits. Because harassment and discrimination lawsuits are much more costly than the comparatively rare First Amendment case, attorneys argue that a broad speech code may be enough to point to

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[29] *Snyder v. Phelps*, 131 S.Ct. 1207 (2011)
[30] Lukianoff, G. *Unlearning Liberty*. Loc: 1062

during litigation to prove that "offensive speech" was prohibited all along. [31] In "Higher Education?" Andrew Hacker and Claudia Dreifus affirm that colleges are society's most-sued institution after hospitals, which contributes to an overly cautious, overly regulated atmosphere hostile to free speech.[32]

With a broad, basic understanding of the climate of speech codes and potential violation of First Amendment rights on U.S. colleges, we can now inspect the arguments for speech codes, review relevant cases decided in the courts, and study a collection of university-specific incidents that illustrate the girth and breadth of recorded censorship incidents. The universities chosen for this study, DePaul University, Harvard University, University of Alabama, University of Central Florida, University of Colorado at Boulder, University of Massachusetts at Amherst, University of North Carolina at Chapel Hill, and University of Oklahoma, were chosen specifically for the number of incidents recorded or published in various forms of media that accurately depicts the range of constitutionally suspect actions universities can take against speech. Though it's noted some of the aforementioned colleges are private institutions and not formally subject to the Constitution, these elite universities also claim complete adherence to the First Amendment and formally recognize the value of unhindered discourse. For example, Harvard's "Free Speech Guidelines" state:

> Free speech is uniquely important to the University because we are a community committed to reason and rational discourse. Free interchange of ideas is vital for our primary function of discovering and disseminating ideas through research, teaching, and learning. Curtailment of free speech undercuts the intellectual freedom that defines our purpose. It also

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[31] *Ibid.* Loc: 1348

[32] Hacker, A. and Dreifus, C. (2010). *Higher Education? How Colleges Are Wasting Our Money and Failing Our Kids – and What We Can Do About It.* New York: Times Books.

> deprives some individuals of the right to express unpopular views and others of the right to listen to unpopular views.[33]

Through this analysis, we can see how university speech codes negatively affect freedom of speech and diminish the fruitful discourse expected of higher-learning institutions by providing a comprehensive examination of the nature of said codes and paving the way for future quantitative research.

[33] Harvard University. "Free Speech Guidelines" (1990). Cambridge, MA. p. 1.

Chapter Two – THE ARGUMENT IN FAVOR OF SPEECH CODES

The majority of university speech codes today contain a similar theme: the prevention of "hate speech." Hate speech traditionally is defined as verbal attacks that target people on the basis of their immutable or deeply ingrained characteristics, or any form of "speech attacks based on race, ethnicity, religion, and sexual orientation or preference."[34] Hate speech, which has never ultimately been upheld as legal under the First Amendment (minus provisions on incitement)[35], is, of course, not to be confused with hate crimes. Hate crime legislation imposes a penalty enhancement in the instance a victim is selected because of his or her "race, religion, color, disability, sexual orientation, national origin or ancestry,"[36] though the legality, efficacy and morality of such impositions are a discussion all of their own. Essentially, a person can legally eject a racist tirade, but cannot attack another on the basis of race or a smattering of other qualities. A convicted suspect may, for instance, receive a higher penalty for a crime committed against another while uttering epithets regarding that person's physical or mental makeup.

Perhaps surprisingly, the United States is virtually alone among Western democracies in abstaining from holding or enforcing laws prohibiting hate speech.[37] For example, German law punishes expression that incites racial hatred,[38] and the Canadian Supreme Court has upheld prohibitions on hate speech directed against groups who have

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[34] Walker, S. (1994) *Hate Speech: The History of an American Controversy.* Lincoln: University of Nebraska Press. p. 8.
[35][35] Brandenburg v. Ohio, 395 U.S. 444 (1969)
[36] *Wisconsin v. Mitchell*, 508 U.S. 47 (1993)
[37] Gould, Jon (2005) *Speak No Evil: The Triumph of Hate Speech Regulation.* Chicago: University of Chicago Press. p. 17
[38] Stein, E. *History Against Free Speech: The New German Law Against the "Auschwitz" – and Other – "Lies."* Michigan Law Review 85 (1986): 277-324.

faced "historical and social prejudice."[39] Historically, there have been only five cases under which the U.S. courts are willing to restrict speech: obscenity; libel; time, place and manner regulations; the clear and present danger test;[40] and fighting words.[41] Hate speech is closely connected to the Supreme Court's category of fighting words – those expressions that by their very nature are likely to bring people to blows – but the two are not completely analogous. Under the 1969 Supreme Court case *Brandenburg v. Ohio*, direct incitement imminent of lawless action or speech likely to do so was found unconstitutional rather than mere advocacy of violence.[42]

How does relate to the academic environment? Consider the example of a professor or student in a history class who wants to discuss use and historical connotation of the word "nigger." The individual's purpose is presumably not to offend members of the community, but rather to explore a contentious subject – a quality that has virtue at a university that some in the audience could find insensitive or provocative. The ensuing discussion would differ in context from the person who cries, "The niggers on campus should go back to Africa,"[43] which is a verbal attack on African Americans on the basis of race. Herein lies the heart of the debate on the constitutionality of hateful speech at the American university. Constitutionally, both of these examples should be protected, both in and outside a college community. But it is hate speech (not action) that is generally restricted by many university speech codes. At these institutions, administrators are essentially defining morality and ethics, and forcing all students to comply with this

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[39] *R.v. Andrews,* [1990] 3 S.C.R. 870 (Can.); *R. v. Keegstra,* [1990] 3 S.C.R. 697 (Can.).
[40] Brandenburg v. Ohio, 395 U.S. 444 (1969), Virginia v. Black, 538 U.S. 343 (2003)
[41] Gould, J. (2005) *Speak No Evil*, p. 18.
[42] Brandenburg v. Ohio, 395 U.S. 444 (1969)
[43] Delgado, R. and Stefancic, J. "Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice," *Connecticut Law Review* 27 (1995): 773-88.

definition. The policy and guidelines could be overly broad and vague enough to prevent expression of unpopular opinions, and the tenets are unlikely to be narrowly tailored enough to reduce likelihood of chilling constitutionally protected speech.

A historical example of the way hate speech is prohibited on campus comes from the early days of university speech codes. In 1993, Pennsylvania freshman Eden Jacobowitz was studying in his dormitory when sorority sisters of an African American sorority began celebrating their founders' day outside the building. Like other students in the area, Jacobowitz asked the women to cease from their activities so he could concentrate on his homework, but was ignored. At wit's end, he eventually shouted, "Shut up, you water buffalo! If you want to party, there's a zoo a mile from here." Of importance is that Jacobowitz is a graduate of a yeshiva, or religious Jewish school, and a rough translation of the Hebrew insult "behema" is "water buffalo." But, because a water buffalo is an animal found in Africa, the women took offense and argued he insinuated black women belong in a zoo.[44]

The University of Pennsylvania accused Jacobowitz of violating the university's policy against insulting or demeaning a person on the basis of race, and he was brought up on charges, despite Penn's policy requiring an affirmative intention by the speaker to "direct injury." Jacobowitz rejected the university's judicial inquiry officer's "plea deal," which would require him to find rehabilitation or face a judicial hearing with the possible punishment of suspension or expulsion, and hired a team of lawyers to defend him.

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[44] Kors, A.C., and Silverglate, H.A. (1998). *The Shadow University: The Betrayal of Liberty on America's Campuses.* New York: Free Press, p. 15.

Jacobowitz and his team created a public relations nightmare for Penn, and four months later all charges were dropped. Two years later, Penn removed its speech policy.[45]

Similarly, in 1990 Brown University expelled junior Douglas Hann after he spewed an epithet-laden rant while stumbling home from his 21st birthday celebration, likely intoxicated. In front of others he disparaged "niggers," "faggots" and "fucking Jews" simultaneously, and his identity was soon discovered and his classmates filed a complaint against him with the student disciplinary council.[46] Hann was convicted of harassment and expelled from the school. The case received national attention when *The New York Times* reported on the story, but Brown's then-president, Vartan Gregorian, stood by the university's decision, stating that Hann's speech violated the policy against "abusive, threatening or demeaning actions."[47]

Not all scholars agree that the majority of university speech codes are unconstitutional – nor that the public does not want them. For example, Joshua Press, with the Northwestern University School of Law, agrees that an institution of higher learning should be committed to accepting a diverse array of ideals, though he argues that student dormitories should be included as a nonpublic forum,[48] as are K-12 public schools, jails and military bases. Regardless, speech must always be regulated in a content-neutral manner. Press argues the state's overriding interest in "attempting to create a safe, calm, and hospitable living environment that is conducive to learning"

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[45] *Ibid.*
[46] Heumann, M. and Church, T.W. with Redlawsk, D.P. (1997). *Hate Speech on Campus: Cases, Case Studies, and Commentaries.* Boston: Northeastern University Press, p. 152.
[47] "Student at Brown is Expelled under a Rule Barring 'Hate Speech,'" *New York Times*, February 12, 1991, A17.
[48] Press, Joshua. "Teachers, Leave Those Kids Alone?" *Northwestern University Law Review* 102.2 (2008).

prohibits right to speak offensively.[49] Students living in such dormitories are essentially a "captive audience" to negative speech, and therefore must have anti-harassment policies established to ensure they feel safe participating in the "marketplace of ideas."[50] However, the U.S. Supreme Court has ruled in *Widmar v. Vincent* in 1981 that for students, the university is part of a public forum.[51]

Press is not the only scholar who contends that colleges are within their rights to create speech codes. Jon Gould rationalizes and defines their necessity by saying, "Where an individual seeks a legitimate debate, even on controversial questions, his message should not count as hate speech. But when the purpose is to offend, to silence, to marginalize, then speech becomes hateful."[52] Under Gould's proposition, however, it could be argued that too much room for subjectivity is allowed under what is "offensive," and actions under the guise of "speech" intended to silence are rarely allowed itself, as will be discussed later.

Gould also argues that FIRE's claim of 94.1 percent of schools with unconstitutional speech codes is alarmist and an exaggeration. Using a random, stratified sample of 100 four-year institutions, Gould found that between 1987 and 1992, almost one-third of American colleges and universities adopted a hate speech code. Of these, 1 percent of institutions adopted policies against fighting words, 15 percent banned generic verbal harassment, 14 percent prohibited verbal harassment against groups, and four percent punished offensive speech. Nearly 500 schools initiated speech policies, and all

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[49] Brown v. Bd. of Educ, 347 U.S. 483, 493 (1954)
[50] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)
[51] *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)
[52] Gould, J. (2005) *Speak No Evil*, p. 16-17.

within four to five years of one another, statistically appropriate to label a trend.[53] Based on this data, Gould suggests only that those schools that adopted restrictions on "offensive speech" truly had unconstitutional qualities in 1987. In 1992, R.A.V. v. City of St. Paul redrew constitutional boundaries, ruling that prohibitions on verbal harassment of groups were unconstitutional if they singled out certain ethnic, racial, religious or gender groups for protection.[54] But regardless, the two categories of prohibited speech codes encompassed just 18 percent of American colleges and universities. Excluding private universities only 1. 5 percent of these schools adopted speech policies that transgressed the First Amendment, Gould said.[55]

To counter Gould, however, it can be argued that compared to FIRE's findings, Gould's smaller study does not accurately account for the sheer number of students attending these institutions where illegal codes are in place. Gould's sampling is random, but FIRE discusses and analyzes nearly 500 of the largest schools in the country. The percentage of schools with an unconstitutional policy may seem small compared to the large number of colleges in the nation, but the number of students attending said schools seems to sway the balance in favor of FIRE's findings.

Gould says many of FIRE's findings are derived from misleading passages in some universities' codes. He says, "FIRE does not distinguish between enforceable rules and exhortative statements; it confuses examples with definitions; and it takes statements out of context."[56] Gould points to FIRE's claim that the University of Michigan's Policy and Guidelines Regarding Electronic Access to Potentially Offensive Material is

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[53] Gould, J. (2005). *Speak No Evil*, p. 76-77.
[54] R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).
[55] Gould, J. (2005). *Speak No Evil*, p. 78.
[56] *Ibid*., p. 174.

unconstitutional for stating, "Individuals should not be unwittingly exposed to offensive material by the deliberate and knowing acts of others." While one's knee-jerk reaction may be to lament its unconstitutionality, the policy applies only to computer systems administrators, not to students or faculty. Later in the policy, Michigan shows favor to First Amendment rights, stating, "System administrators will have to guard against making judgments as to the appropriateness of the content of another person's work. Research and instruction take many forms and may not be restricted through censorship."[57] Even well-known advocates like Robert O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression and former president of the University of Virginia, have expressed their doubt about FIRE's claims. O'Neil remarks, "I just can't believe there are anything like that number of genuine (unconstitutional) speech codes."[58]

Thor Halvorssen, former CEO of FIRE and current CEO of the Human Rights Foundation, said in a 2002 interview with the Washington Post Magazine that FIRE "doesn't oppose private college speech codes if the rule makers are honest about them," but at public schools they are "manifestly unconstitutional."[59] The codes' early opponents during the late 1980s and early '90s, however, neglected the technical legality of hate speech policies and instead attempted to spread alarm at what they viewed as academic elites creating "thought control" and censorship through breakdown of free expression.[60] That thinking continued in the same vein to propose that if an influx of college students could be persuaded to adopt and accept social equality values (at the expense of free

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[57] *Ibid.*
[58] McMurtirie, B. "War of Words," *Chronicle of Higher Education*, May 23, 2003, A32
[59] Matthews, J. "The Perils of Campus Candor," *Washington Post Magazine*, November 10, 2002, W18.
[60] Gould, J. (2005). *Speak No Evil*, p. 78.

speech values), new waves of speech regulation could occur in mainstream society and legal realms after the students graduate and mature.[61] Gould's study reflects this sentiment, as he connected the speech codes to schools that were prestigious and selective, had experience anti-apartheid protest, maintained black or minority studies departments, sponsored gay/lesbian organizations, enrolled graduate students and full-time undergraduates, and employed few female faculty. Apart from the curious, negative connection to the percentage of female faculty, these results are consistent with the critics' theory of the speech codes.[62] There is additional research that links a college's prestige to the liberalness of its faculty (and presumably its students).[63] And so hate speech measures became a trend in higher education, a badge of honor for schools, showcasing their commitment to social progress. If schools like Michigan and Stanford could adopt these policies, so too could any state college with national ambitions.

It looked like the beginning of the end of speech prohibitions on campus in March 1995, when the California superior court confirmed what four other courts before it had ruled – that collegiate hate speech codes (specifically Stanford's, in this case) were constitutionally suspect.[64] Another study by Jon Gould, however, found the opposite to be true. The year 1997 saw a jump in surveyed universities with speech codes. Of the 100 universities previously surveyed, 54 percent had no speech policy and the other 46 percent allocated thus: 4 percent centered on fighting words, 19 percent verbal harassment, 11 percent verbal harassment against minorities and 12 percent against

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[61] *Ibid*., p. 79.
[62] *Ibid*., p. 85.
[63] See Ladd Jr., E.C. and Lipset, S.M. (1975). *The Divided Academy: Professors and Politics.* New York: McGraw-Hill.
[64] *Corry v. Stanford University*, No. 740309 (Cal. Super. Ct. filed Feb. 27, 1995)

offensive speech, variations of minus 11, 3, 4, minus 3 and 8 percent, respectively.[65] Most surprisingly, following the court rulings, the number of speech policies in the most unconstitutional category – vaguely prohibiting offensive speech – rose the sharpest, and most schools kept or develop their policies on the books in the face of contrary legal rulings.

Technically, only the parties to a specific lawsuit are formally required to abide by the holding. In regards to hate speech codes, Michigan, Wisconsin, Central Michigan and Stanford would be the only universities subject to judicial sanctions had they not amended their policies after legal proceedings against them were complete. More broadly, however, the rulings hypothetically should have set a tone on what will or will not be tolerated in the academic environment. Universities were now faced with a quandary: would they bring their policies in line with the spirit of the First Amendment, essentially invalidating their approach, or would they fail to recognize the persuasive authority of the courts' decisions?

Jon Gould examined universities' reactions and estimated that nationwide, 14 percent kept offending policies, 9 percent adopted an offending policy, 2 percent removed an offending policy, 17 percent kept a non-offending policy, 6 percent adopted a non-offending policy, 0 percent removed a non-offending policy, and 51 percent continued to have no relevant policy.[66] Gould predicts that those schools employing passive noncompliance, or the act of maintaining offending policies regardless of legal definitions, did so out of the assumption by collegiate administration that the symbolic advantages of keeping the suspect policies on the books outweighed the low odds that

[65] Gould, J. (2005). *Speak No Evil,* p. 150-151.
[66] *Ibid*., p. 153.

they would be challenged in court. Those who created policies regardless of court decision did so, Gould suggests, by constructing policies administrators either believed would barely skirt legal precedent or blatantly in the face of the new rulings due to the understanding speech policies were the norm in higher education regardless of court rulings.[67]

Even today, the informal law of speech regulation has prospered, despite the outcome of legal battles in court. Could it be possible, then, that speech codes will eventually and ultimately have an effect on future First Amendment findings? The bounds of free speech continue to be pressed and reinterpreted despite court rulings advocating for the contrary. Jon Gould in his study comments that policies are rarely enforced, occurring at most once a year. He quotes a former college president, who says, "Adopting policies is easier than acting on actual cases… Policies are non-action," which most college administrators prefer, he says. "The adoption does nothing."[68] Claims by opponents of indoctrinating young adults in schools may not be accurate, as well. A series of surveys conducted at the University of California at Los Angeles shows that freshmen arrive at school already with anti-hate speech ideals. In a 1993 survey, 58 percent of first-year students supported hate speech regulation.[69] In 1994, two thirds approved of prohibitions,[70] and by the early 2000s, the number had leveled off at around 60 percent of incoming students favoring control of hateful speech.[71] Gould found that national media trends were similar; non-existent in 1988, picked up steam, peaked in the

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[67] *Ibid*., p. 154.
[68] *Ibid*., p. 175.
[69] Astin, A.W., Korn, W.S. and Riggs, E.R. (1993) *The American Freshman: National Norms for 1993.* Los Angeles: University of California at Los Angeles.
[70] Astin, A.W., Korn, W.S., Sax, L.J. and Mahoney, K.M. (1994). *The American Freshman: National Norms for 1994*. Los Angeles: University of California at Los Angeles.
[71] Sax, L.J., Lindholm, J.A., Astin, A.W., Korn, W.S. and Mahoney, K.M. (2001). *The American Freshman: National Norms for 2001*. Los Angeles, University of California at Los Angeles.

mid 1990s, and tapered off by the late '90s.[72] But, as Anna Quindlen has said, media "do not make social policy, only reflect it once it moves convincingly from the fringe into the mainstream."[73]

Simply, proponents of hate speech regulation conclude that it has triumphed in the face of formal constitutionalism. This is especially ironic, as traditional legal theory suggests that formal law prevails, and the support of legal institutions must be attained to secure constitutional rights. As Jon Gould, one of the foremost apologetics for campus speech policy, says, "What may have begun as an instrumental, intra-academic exercise has not been dispatched by its critics. In the early morning of a new century, the norm of hate speech regulation has grown to challenge the formal Constitution."[74]

[72] Gould, J. (2005). *Speak No Evil,* p. 179.
[73] Quindlen, A. "Getting Rid of the Sex Police," *Newsweek*, January 13, 2003, p. 72.
[74] Gould, J. (2005). *Speak No Evil,* p. 187.

Chapter Three – NOTABLE U.S. COURT RULINGS ON LEGALITY OF UNIVERSITY SPEECH CODES.

Recently, the U.S. Supreme Court has again ruled[75] that speech may not be prohibited just because it is offensive. The Westboro Baptist Church, founded in 1955 by Fred Phelps, long has been under scrutiny for its offensive protests at military members' funerals and signs expressing negativity towards the gay community.[76] The U.S. Supreme Court agreed to hear the case after the appellate court found in favor of Snyder, and found Westboro liable for $2.9 million in damages. Snyder, whose son had died in Iraq, claimed emotional damage from Phelps and members of his church (comprised almost entirely of his family) picketing his son's funeral. Westboro kept 1,000 feet away from the church the funeral was held in, and Snyder admitted he did not see Phelps' signs until media reports surfaced. Chief Justice John Roberts, in the opinion, writes, "What Westboro said, in the whole context of how and where it chose to say it, is entitled to 'special protection' under the First Amendment and that protection cannot be overcome by a jury finding that the picketing was outrageous."[77] In essence, the courts have repeatedly ruled that an exception to the First Amendment is not created simply because speech is grossly offensive.

Court cases influencing university speech codes have occurred at fairly regular intervals, beginning in the late 1980s and continuing today. Also consistent is the seemingly constant decision by the courts in favor of the First Amendment and on-campus rights. Like any other legal issue, precedent from rulings prior to recent cases are

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[75] *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 574, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).
[76] Snyder v. Phelps, 131 S.Ct. 1207 (2011)
[77] *Ibid.* p. 1219

often applied to determine legality and constitutionality. Below is a discussion of select prominent court cases through the years involving and explaining the judicial makeup of university speech code legitimacy today.

Sweezy v. New Hampshire[78]

During a time when fear of communism was high, prosecution of "subversive individuals" was not uncommon. This sentiment was no different at the University of New Hampshire, when a professor, Paul Sweezy, was subject of an investigation conducted by a State Attorney General, acting on behalf of the State Legislature, on whether he or his family members and associates were communists. New Hampshire passed legislation in 1951 prohibiting "subversive persons" from working for the state, and had Sweezy been found guilty of lecturing in favor of or believing communism, would have likely been terminated.

Sweezy was summoned twice to appear before the attorney general, once in January 1954 and again a few months later in June of that year. He was interrogated at length on a multitude of subjects in attempt to discern his involvement with the communist party. He refused, however, to respond to a number of questions that were either impertinent to the subject under inquiry or against his First Amendment rights, which included items like "Didn't you tell the class…that socialism is inevitable in this country" and "Was Charles Beebe active in the Progressive Party in New Hampshire?"[79] Though Sweezy did affirm that he classified himself as a Marxist and socialist, he refused to discuss his involvement with the Progressive Party in New Hampshire and the

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[78] *Sweezy v. New Hampshire,* 354 U.S. 234 (1957)

[79] *Ibid*. p. 243

members thereof he may have been associated with in personal or professional life. The court held him in contempt for his silence.

On appeal, the state courts upheld the contempt charge, citing New Hampshire's ability to investigate on an individual's status as a "subversive person." They found the state had substantial interest in the content of Sweezy's in-class lectures, as preservation of government overrode personal freedoms, and that his teachings reflected upon his character. The U.S. Supreme Court ruled that the inquiry must fall on the basis of scrutinizing a teacher as a person. As Chief Justice Earl Warren expressively penned:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[80]

Keyishian v. Board of Regents[81]

In 1967, four professors of the State University of New York and a librarian sued after the act or threat of termination at the university was applied to them when they refused to comply with the teacher loyalty laws and regulations, which they alleged were unconstitutional. When the private University of Buffalo merged in 1962 with the SUNY, a public institution, faculty members simultaneously became required to comply with a New York law that, like in *Sweezy*, prevented the appointment or retention in state employment of "subversive persons." The professors – newly minted state employees –

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[80] *Ibid*. p. 250
[81] *Keyishian v. Board of Regents,* 385 U.S. 589 (1967)

refused to sign a certificate required by law confirming that they were not communists, or if they had been in the past, that the school president was aware. The librarian was not forced to sign said certificate, but instead must take an oath affirming that he had never promoted overthrow of the government by force, which he refused to do. When faced with termination, the appellants sued on the basis that the laws were not in compliance with the First Amendment.

The U.S. Supreme court agreed with the appellants, and found New York's Education Law prohibiting speech that is "treasonable or seditious" anti-First Amendment. The judges concluded that subjecting teachers to the confinement of speech that may arbitrarily violate on accident does a great disservice to academic institutions, as do provisions requiring yearly reviews of every teacher for lectures, utterances, words and writings of "subversive" material. Specifically, the Court affirmed the extended need for free speech at the university level, rather than the restriction.

Justice William Brennan writes in the opinion, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." He also referenced John Stuart Mill, calling the university the epitome of the "marketplace of ideas," and that, "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth…."[82]

Healy v. James[83]

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[82] *Ibid.* p. 372

[83] *Healy v. James,* 408 U.S. 169 (1972)

Central Connecticut State College in 1969 prohibited students from forming a local chapter of the left-leaning organization Students for a Democratic Society (SDS), primarily on the grounds that the organization was responsible for acts of violence on other campuses throughout the nation. When considering this case, the U.S. Supreme Court again acknowledged the environment of free speech on campuses:

> As the case involves delicate issues concerning the academic community, we approach our task with special caution, recognizing the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process. We also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance.[84]

During the civil unrest common at many universities in the late 1960s and early 1970s, a number of riots and vandalism had occurred, spearheaded and led in some instances by a branch of SDS. Using proper measures, students filed an application for the branch of SDS to become recognized by CCSC. The Student Affairs Committee declared the statement of purpose satisfactory, but was concerned about the image and reputation of the National SDS organization. In response, the petitioners said they would not affiliate with any national organization and would remain completely independent. The committee questioned the petitioners on whether they would engage in disruption or violence, to which the students responded they did not know, and it would be impossible to say. The committee approved the request on the basis that other groups along the political spectrum were recognized, but the request was later denied by CCSC president, Don James. He said the organization's philosophy was antithetical to the school's

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[84] *Ibid*. p. 171

policies and that the local group's independence was doubtful. The students filed suit for breach of First Amendment rights.

Though in theory the students could have met as a group totally unaffiliated with the university, official recognition provides many benefits, including the opportunity to place announcements regarding meetings, rallies, or other activities in the student newspaper; using various campus bulletin boards; and the ability to use campus facilities to hold meetings. Pursuant to a district court's order, the Dean of Student Affairs was assigned as a hearing officer for the students' appeal. Again, they further affirmed that they would be entirely independent from the national organization and even pledged to change the name to "Students for a Democratic Society of Central Connecticut State College." Their faculty adviser also testified that some SDS branches in the nation were independent. James, however, reaffirmed his previous denial.

The Supreme Court ruled again that the First Amendment has no less application to individuals based on their status as students or their attendance at a state university. Borrowing from *Shelton v. Tucker,* Justice Lewis F. Powell, Jr. noted in that opinion that nowhere does court precedent say "First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"[85] The Court also said that right of individuals to associate to further their personal beliefs is protected by the First Amendment, and this was infringed on, especially when the students were removed from an on-campus coffee shop for meeting as an unrecognized group. Denial of use of campus facilities and resources prevents the organization from remaining a viable entity in the community, and

[85] *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

without the stamp of approval from administration, the petitioners' organization would not be able to sustain itself. The Court noted that the "wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society," and remanded the case for reconsideration.

Papish v. University of Missouri Curators[86]

Barbara Papish, a 32-year-old graduate student, was expelled from the University of Missouri School of Journalism in 1973 after distributing a newspaper on campus "containing forms of indecent speech" in violation of a bylaw by the Board of Curators. The specific edition of the newspaper, the Free Press Underground, was found in violation both because it contained a cartoon (published elsewhere previously) that depicted a police officer raping the Statue of Liberty and the Goddess of Justice as well as an article titled "Motherfucker Acquitted." The article's title was a reference to the assault trial and acquittal of a New York City child who identified as part of a gang known as "Up Against the Wall, Motherfucker." Papish was expelled following a hearing for violating the school's General Standards of Student Conduct, which prohibited "indecent conduct or speech." She brought an action against the university, found no relief through the lower courts, and the U.S. Supreme Court agreed to hear her case. This case was influenced, in part, on *Cohen v. California.*[87] In *Cohen*, 19-year-old Paul Cohen was arrested for disturbing the peace for wearing a jacket inside the Los Angeles County Courthouse that had "Fuck the draft" written on it. The U.S. Supreme Court ruled that a

[86] *Papish v. University of Missouri Curators,* 410 U.S. 667(1973)
[87] *Cohen v. California,* 403 U.S. 15 (1971)

simple public display of a swear word did not count as unconstitutional obscenity. In his opinion, Justice John Marshall Harlan II wrote that "one man's vulgarity is another's lyric."[88]

Relying on *Healy,* the Court again ruled that a state university may not prohibit the mere dissemination of ideas based on offensiveness or conventions of decency. The Court also argued that in concurrence with recent rulings, neither the headline nor the cartoon could legally be labelled as obscene. The Court reversed the judgment and ordered Missouri to restore her credits and reinstate her as a graduate student.

Widmar v. Vincent[89]

Cornerstone, a Christian religious group at the University of Missouri at Kansas City, found itself in 1977 suddenly unable to meet in university buildings, which it had done for the prior four years. The exclusion was based on a regulation, adopted by the Board of Curators in 1972 that prohibits the use of university buildings or grounds "for purposes of religious worship of religious teaching." Eleven student members of Cornerstone brought suit, alleging that their First Amendment rights were infringed upon with respect to freedom of speech and exercise of religion.

Missouri's chief claim against Cornerstone was that the university has a compelling interest in maintaining strict separation of church and state, citing the "Establishment Clauses" of both the Federal and Missouri Constitutions. A three-pronged test, however, had been set as precedent, which the U.S. Supreme Court utilized in making a determination on whether the religious group's involvement with the university offended the Establishment Clause:

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[88] *Ibid*. p. 25
[89] Widmar v. Vincent, 454 U.S. 263 (1981)

1. The governmental policy must have a secular legislative purpose.
2. Its principal or primary effect must be one that neither advances nor inhibits religion.
3. The policy must not foster an excessive government entanglement with religion.

Both the District Court and Court of Appeals agreed that the first and third prongs of the test are substantially met. However, as the university and District Court argued, allowing a religious group to share the limited public forum would have the "primary effect" or advancing religion. The U.S. Supreme Court, however, ruled in Justice Powell's opinion that the nature of the case is misconceived and that by prohibiting a religious group from using facilities equally open to other students and organizations, the school was censoring said group based on the content of its speech. While the Court recognized that religious groups would indeed receive benefit from using university facilities, "incidental" benefits do not constitute promotion of religion any more than they would hypothetically be promoting one political view over the other. The Court ruled that state governments and universities have no need to go beyond constitutionally appropriate standards to ensure separation of church and State, and affirmed the Court of Appeals' finding.

UWM Post v. Board of Regents of the University of Wisconsin[90]

On the heels of racial incidents at the University of Wisconsin system in the mid- to late 1980s, the Board of Regents crafted a "Design for Diversity" plan in 1988

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[90] *UWM Post v. Board of Regents of the University of Wisconsin,* 744 F. Supp. 1163 (E.D. Wis. 1991)

designed to quell tensions and show its commitment to multi-cultural understanding. The board also developed a "Policy and Guidelines on Racist and Discriminatory Conduct" and a rule, UWS 17.06, by which administrators could punish students for the following items:

1. For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:
   A. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
   B. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.
2. Whether the intent required under the first provision is present shall be determined by consideration of all relevant circumstances.

The rule proceeded to provide a number of examples wherein a student would be found in violation of this rule, including "He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or 'jokes';" and "His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed."[91] A student would not be in violation, though, if he or she expressed adverse opinions in a classroom, because those opinions would not be directed specifically at one individual and there would be no proof of intent to produce a hostile environment.

[91] *Ibid*. p. 2

By the time a federal district court heard this case, at least nine students had been disciplined under the rule. Among the examples provided by the court was the case of a student who was placed on permanent probation and ordered to receive psychological counseling for yelling, "You've got nice tits!" and another student who told an Asian American that "It's people like you – that's the reason this country is so screwed up" and "You don't belong here."[92]

The plaintiffs, members of the UW-Milwaukee's newspaper, the UWM Post, and others brought suit against the system, claiming that the rule violated the First Amendment. The Board of Regents, on the other hand, argued it was constitutional under the fighting words provision, which was established primarily in the Chaplinsky v. New Hampshire case in 1942,[93] and that it parallels laws similar to those governing workplace environments. Title VII of the Civil Rights Act prevents employers from "discriminat[ing] against any individual with respect to his … conditions or privileges of employment because of such individual's race, religion, sex or national origin."[94] Juxtaposed with speech code policies, Title VII does indeed look quite similar. The judges did ruled though, that Title VII addresses employment settings exclusively, and is irrelevant to this case.

The district court found that racial epithets did not meet the fighting words scrutiny that had been more narrowly tailored since Chaplinsky, and that their utterance was unlikely to cause a breach of the peace. While saying "nigger" to an African American may be likely to incite him or her to violence, the definitions of the UW rule

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[92] *Ibid*. p. 4
[93] *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942)
[94] 42 U.S.C. § 2000e-2.

covered more situations than would likely cause an immediate breach of peace. The U.S. Supreme ruled in favor of the plaintiffs, concluding that:

> The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction.[95]

Dambrot v. Central Michigan University[96]

The first university speech code case decided by an appellate court involved Keith Dambrot, the white 1992-93 Central Michigan University basketball coach who used a racial epithet in the locker room during a game either at halftime or post game. Dambrot, whose squad was on the losing end of the contest, asked his team (which was made up of 11 African Americans and three Caucasians) if it were "okay for [him] to use the 'N-Word.'" After his team implied it was permissible, Dambrot proceeded to call various members of the team and coaching squad – white and black – "niggers." He also suggested "We need more niggers" on the team. His definition of the word, he said, was that a player was hard-nosed, tough, gritty, etc., and that he simply used the word – with the players' apparent permission – as the team members frequently did throughout practices and games.

The school's athletic director, Dave Keilitz, interviewed the players about the incident, and they said they were not offended by Dambrot's comments, though one player complained to the school's affirmative action officer a time after the interviews took place. Dambrot was suspended for five games for violating the school's discriminatory harassment policy. Once word got out to the campus community of the

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[95] *Ibid*. p. 20
[96] *Dambrot v. Central Michigan University*, 55 F.3d 1177 (1995)

locker room event, the students demonstrated, and national media reported on Dambrot's transgression. He was then informed he would not return for the following season and was released, and he instituted a lawsuit against the university, claiming on First Amendment grounds that utterance of the word "nigger" was not sufficient grounds for firing. Several members of the basketball team joined their coach in the lawsuit. CMU's discriminatory harassment policy defined racial and ethnic harassment as:

> [A]ny intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by ... (c) demeaning or slurring individuals through ... written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.[97]

The Sixth Circuit Court of Appeals struck this policy down, saying that it was purposely sweeping and vague to include as much speech and conduct as possible. The policy also reached a substantial amount of constitutionally protected speech. CMU argued that the policy was indeed constitutional because there was no enforcement mechanism, and it was applied only in circumstances wherein the First Amendment was not effectual, but was vague on what exactly those circumstances entailed. The court rejected this defense, stating that regardless of intent, the university would be able to subjectively censor nearly any desired opinion. Judge Damon Keith wrote that:

> Though some statements might be seen as universally offensive, different people find different things offensive… Several players testified they were not offended by Dambrot's use of the N-word while student Norris and affirmative action officer Haddad were extremely offended… Defining what is offensive is, in fact, wholly delegated to university officials. This "unrestricted delegation of power" gives rise to the second type of vagueness. For these reasons, the CMU policy is also void for vagueness.[98]

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[97] *Ibid*. p. 1182
[98] *Ibid*. p. 1184

McCauley v. University of the Virgin Islands[99]

One of the more recent examples of the courts' dealings with university speech codes on university campuses today, *McCauley* provides an examination into constitutionally suspect policies currently on the books at institutions of higher learning around the nation. Today's policies generally put emphasis on "harassment." In 2005, UVI student Stephen McCauley ventured to a beach with two of his classmates, who soon thereafter engaged in a sexual act. The next day, the female of the group charged the male with rape. After learning of the charge, McCauley visited the female, Jenna Piasecki, repeatedly over the course of the next month to discuss the charge. Piasecki complained to administration that McCauley had harassed her, and UVI officials repeatedly told McCauley to refrain from contacting Piasecki. In November of that year, McCauley was charged with violating the Student Code of Conduct, which prohibited:

> Committing, conspiring to commit, or causing to be committed any act which causes or is likely to cause serious physical or mental harm or which tends to injure or actually injures, frightens, demeans, degrades or disgraces any person. This includes but is not limited to violation of the University policies on hazing, sexual harassment or sexual assault.

It also prohibited "offensive" or "unauthorized" signs and conduct causing "emotional distress."

Shortly after the charge, McCauley filed suit against UVI and administrators for violating his First Amendment rights and freedom of association. He was shortly thereafter criminally charged with witness tampering, and university proceedings were placed on hold until 2009 until completion of the criminal investigation, when a charge of violating UVI's drug and alcohol policy was added to the initial complaint. He was ordered to write a letter of apology to Piasecki and pay $200.

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[99] McCauley v. University of the Virgin Islands, 618 F.3d 232(3rd Cir. 2010)

The district court had previously invalidated the policy as constitutionally overbroad in McCauley's suit, but allowed two other policies to remain intact despite comparing precedent and court decisions regarding university speech rights to those of K-12 students. In this case, the court struck down the two remaining policies as flawed, writing that "desire to protect the listener cannot be convincingly trumpeted as a basis for censoring speech for university students."[100] Additional reasons for striking down the policies included prohibition of conduct causing "emotional distress," wherein the court opined that literally every phrase made by a student has capacity to subjectively cause another emotional distress. The court said "substantial" damage to free speech is committed with this and similar policies on the books. The Third Circuit also confirmed that it is not appropriate for universities to treat their students as children, and that "[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools."[101]

[100] *Ibid*. p. 248
[101] *Ibid*. p. 247

Chapter Four – EXAMPLES OF SPEECH CENSORSHIP BY UNIVERSITIES IN RECENT YEARS

The vast majority of instances wherein students or faculty are punished by universities do not reach courtrooms. Instead, infractions are met by attention and bad publicity from students, national and local media and advocacy groups, like FIRE or the American Civil Liberties Union. The following universities were selected as a representation of the variety of potential First Amendment offenses committed against faculty and students. While not a comprehensive list, these examples provide insight and discussion into the common types of free speech incidents occurring in the modern academic environment, what the response is from the aforementioned groups, and how the instances are concluded.

University of Alabama

The University of Alabama in 2003 banned university dorm window displays after a Confederate flag was hung in Byrd Hall, home to students in the Mallet Assembly honors program. Residential Life administration ordered the flag removed, but the faculty in residence for the dorm, Byron White, refused to do so. He argued that adorning windows in a residence hall was one of the constitutionally protected methods by which students were able to express themselves, whether it be a poster of a favorite band or, in this case, a controversial flag.

"While fighting for the right to display a Confederate flag is controversial and makes many people nervous, a blanket denial of rights by the university is a much less

tenable position for them, and a lot more people are willing to fight it," White told The Tuscaloosa News.[102]

Officials claimed, however, that the ban was not for the removal of the Confederate flag per se, but that window expressions by one student living in a community could portray all members of that community as endorsing it. Residential Life Director Lisa Skelton said the policy was created to give students an opportunity to define what is overly offensive, and that the majority of students supported the ban.[103] White countered that students in a community should be able to discuss among themselves what is and is not appropriate without university intervention or creation of subjective rules. [104]

Though no student was specifically prosecuted, and it was technically legal for UA to ban all window displays at the time the policy was enacted, Residential Life's action poorly taught students about their rights and guarantees of the First Amendment. The policy was suspended at the beginning of the school year[105] and was later tabled indefinitely. [106]

The next year, the University of Alabama administration again infringed the First Amendment rights of campus community members, this time against a faculty group. The Alabama Scholars Association, a conservative-leaning branch of the National Association of Scholars, was cut off from using the low-cost campus mailing system after creating

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[102] Dawkins, A. "UA plans to ban window displays in dorms." *The Tuscaloosa Daily News*, July 21, 2003. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/4153_2468.pdf

[103] Whisenhunt, D. "Students plan to fight for their First Amendment rights." *The Crimson White,* August 6, 2003. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/4261_2545.pdf.

[104] Dawkins, A. "UA plans to ban window displays in dorms."

[105] Garret, J. "Proposed Res Life policy to be postponed." *The Crimson White,* August 21, 2003. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/4367_2609.pdf.

[106] Foundation for Individual Rights in Education. "FIRE coalition shatters window display censorship policy at University of Alabama," October 3, 2003. http://www.thefire.org/fire-coalition-shatters-window-display-censorship-policy-at-university-of-alabama/.

and mailing a newsletter, The Alabama Observer, critical of the supposed grade inflation at UA and calling for term limits of faculty. ASA says its sudden ban from the system is in retaliation for the content of the newsletter.[107]

UA Provost Judy Bonner replied that ASA's removal from the low-cost system was not because of the content of the newsletter, but because the group distributed to places outside the university. David Beito, co-president of ASA, defended his organization, telling Alabama's student newspaper, The Crimson White, that, "[University administration] will do anything to silence criticism. The University administration does not want to be criticized, and we are considered traitors because we don't promote University public relations."[108] He noted that another group, the Coalition for Diversity and Inclusiveness, employs non-UA members, mails outside the community and is still included in the low-cost system. Marten Utlee, campus contact for the American Association of University Professors, which was also included in the removal from the mailing system, called the university's decision an "attempt to tax the expression of certain ideas." [109]

All too convenient, it seems for UA, to sanction ASA immediately after the critical newsletter was published. Administrators soon backtracked, and said the real reason ASA was removed was because it was not a "bona fide" organization. However, no system is in place at UA for a faculty organization to become "bona fide." No press release or media coverage ever announced the outcome of the dispute between ASA and UA.

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[107] "Sen. Sessions makes special trip to DC." *The Mobile Register*, May 31, 2004. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/3964_2339.pdf.
[108] Caddel, M. "University administration concerned about UA professors' usage of mailing system." *The Crimson White,* June 9, 2004. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/3962_2338.pdf.
[109] *Ibid.*

The University of Alabama's tendencies toward censorship continued the next year, when the Faculty Senate created a "hate speech" policy condemning discriminatory speech and advising UA administration to forbid sponsored speakers from making racist, sexist, ethnic or homophobic statements after a comedian made jokes at a performance "derogatory of gay persons."[110] University officials, in this instance, seemed to have forgotten that comedy has long been noted for pushing the boundaries of civility. In the resolution, the Faculty Senate "recognizes that the right to freedom of speech is not absolute and is subject to both legal restrictions and standards of civility," and as such, "the University of Alabama has a duty reflected both in law and in standards of civility to control behavior which demeans or reduces an individual based on group affiliation or personal characteristics, or which promotes hate or discrimination, in all formal programs and activities."[111] Again, the Senate has implied that the First Amendment does not protect speech that does not meet the "standards of civility" and that speech subjectively or ambiguously labeled "uncivil" should be censored and punished.

At a UA Law conference, FIRE founder Harvey Silverglate condemned the speech codes, saying that, "[These people] think they are fighting the good fight. They claim that they are fighting for the underdog, equal treatment, that they are fighting racism, sexism and homophobia, when, in fact, they are not fighting those evils at all. They are fighting for the destruction of a free society."[112] UA Faculty Senate President John Mason countered that free speech is not banned, but that offensive content is

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[110] **"**Resolution for the Adoption of a University Policy Opposing Unacceptable Behavior Demeaning Individuals or Groups on Campus and Prohibiting the Use of University Funds or Facilities by Those Making Such Statements." Faculty Senate of the University of Alabama, (2005). Retrieved from the Foundation for Individual Rights in Education**:** http://www.thefire.org/university-of-alabama-faculty-senate-hate-speech-resolution/**.**

[111] *Ibid.*

[112] Foundation for Individual Rights in Education. "Speech resolution draws ire." November 15, 2004. http://www.thefire.org/speech-resolution-draws-ire/

unwelcome. "I don't care if people go out to the Quad or any other area and say wherever they want," he said. "I just don't want the University to pay for [hate speech]."[113] As before, while declining to employ persons for entertainment that some may find offensive is not necessarily constitutionally suspect, including in contracts censorship – self-imposed or otherwise – and the promise not to offend sets a bad example for expectations and learning how to deal with offensive content. It also creates a slippery slope to prohibition of other topics and further restrictions on speech, not to mention stifles the intrinsic qualities and traditions of comedy.

Surprisingly, the University of Alabama Student Senate came up with a resolution of its own to combat the Faculty Senate's. In February 2005, the Student Senate unanimously passed a free speech resolution, which stated that "[f]ree speech is absolutely vital to the mission of any university, where new and often controversial ideas must be discussed openly and rationally in order to make advances in knowledge" and proclaimed that "[b]y defending free speech for all students, one in no way condones any kind of hate or intolerance; [o]n the contrary, one is promoting tolerance of others despite their differences, especially their differences of opinion."[114] This resolution by the Student Senate is a rare and bold move by students to reject restrictions created by university higher-ups and preserve freedom.

University of Central Florida

Speech at the University of Central Florida is only permissible at certain areas, according to UCF policies. In 2006, an anti-Iraq war protest was held on campus by

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[113] *Ibid.*

[114] Samples, P. University of Alabama Student Senate (2004-2005) Resolution #R-98-04. University of Alabama Student Senate. Distributed by the Foundation for Individual Rights in Education at: http://www.thefire.org/university-of-alabama-student-senate-2004-2005-resolution-r-98-04/.

members of the Students for a Democratic Society and broken up by police because the students had gathered outside approved "free-assembly zones." UCF senior Patrick DeCarlo, a student present at the protest, filed a grievance against the university and argued that the scene of about 40 protestors was neither loud, violent or obtrusive. "It was shocking to see UCF police come out and say, 'You have to leave or you're going to be arrested for trespassing,'" he said to the Daytona Beach News-Journal. "We pay to go there. We know the public university is supposed to be a marketplace of ideas, not injustice."[115] In an all-too-rare demonstration against censorship, the UCF Student Senate also passed a pro-First Amendment resolution, noting that creation and enforcement of such zones are hostile to free speech purposes and create a chilling effect.

The policy explicitly stated that only four areas on campus were allotted as "free speech zones," wherein students could protest or hold some semblance of assembly. The rule stated that the protests could not cause "interference…in the best interests of the University," which would be defined and applied on a case-by-case basis by the university president or another designee.[116] The policy was upgraded a year later to shrink the size of the aforementioned zones, and include provisions on sound monitoring, wherein "it must not be of such a volume that would excessively and unnecessarily interfere with the actions of members of the UCF community or those neighborhoods surrounding the campus." A university official, who would have to be paid for by the protesting organization, would be on-hand at all times to monitor volume.[117] UCF's

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[115] Harper, M. "Students challenge UCF's 'free-assembly' policies." *The Daytona Beach News-Journal,* December 6, 2006. http://www.news-journalonline.com/NewsJournalOnline/News/Local/newEAST02120606.htm.

[116] UCF Free Assembly Areas Policy. The University of Central Florida. Distributed by the Foundation for Individual Rights in Education on September 1, 2006, at: http://www.thefire.org/ucf-free-assembly-areas-policy/.

[117] *Ibid.,* at: http://d28htnjz2elwuj.cloudfront.net/pdfs/5ba25e63e379972cf182df8ad39d5392.pdf.

policy remains in effect to date. The 1989 U.S. Supreme *Ward v. Rock Against Racism* is relevant to this example, as the Supreme Court ruled that there is significant government interest in regulating noise, as long as it is content neutral,[118] though it could be argued ulterior motives could be at stake here, regardless.

The mid-2000s began to pose another question of constitutionality when social media sites like Facebook.com gained traction in the university setting. In 2005, at a time when Facebook users were required to have an .edu email address to register for a profile, University of Central Florida student Matthew Walston created a Facebook group titled "Students Against Victor Perez," with a description that read "Victor Perez is a jerk and a fool." Perez, a fellow student running for student government, filed a complaint about Walston to the Office of Student Conduct, and Walston was charged with "personal abuse" and "harassment" and set to proceed through the Student Conduct Review process.[119]

Walston contacted FIRE for advice and representation, and the organization wrote UCF and explained that the charge "not only trivializes actual harassment by equating it with language that is simply opinionated, but also chills expression on UCF's campus and ignores constitutional guarantees of freedom of speech."[120] Walston was found "not in violation" of personal abuse. This case, though not reaching any level of the court system, nonetheless exemplifies the extent to which some universities will monitor student activity to monitor decency and punish those who offend. As social media becomes a more primary means of communication for young adults, this instance serves

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[118] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)
[119] Foundation of Individual Rights in Education. "Student wins Facebook.com case at University of Central Florida," March 6, 2006. http://www.thefire.org/student-wins-facebookcom-case-at-university-of-central-florida/.
[120] *Ibid.*

as an example – and hopefully some sort of standard – for rejecting university officials' overreach.

Universities' sanctions are not exclusive to students or organizations, as in the case of Hyung-il Jung, a professor of hospitality management at the University of Central Florida. While teaching a class of about 25 students in a hospitality management accounting class in 2013, Jung witnessed the pained look on a number of faces during a review, and joked, "This question is very difficult. It looks like you guys are being slowly suffocated by these questions. Am I on a killing spree or what?"'[121] Though most students allegedly laughed with the professor and later said they understood the context of the remark, one student complained to administration.

Jung was placed on paid administrative leave, was banned from campus, prohibited from contacting any students and required to take and pass a psychiatric exam before being allowed to return to his duties. [122] Granted, Jung admits he could have selected a different word, especially on the heels of UCF police stopping what appeared to be plans by a UCF student to carry out a mass slaying on campus. However, as many aforementioned examples here argue, bad taste is nonetheless protected by the First Amendment, and UCF administrators flexing their might over what is fairly apparent to be a poorly timed joke is a gratuitous overreach in interpreting freedom of speech. The university received multiple emails from Jung's students supporting him and explaining his comments were taken out of context, and a petition to reinstate him circulated on campus. Campus, media and advocacy groups' uproar aided Jung, it appears, and the

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[121] Ordway, D. "UCF instructor placed on leave after 'killing spree' comment." *The Orlando Sentinel.* April 25, 2013. http://articles.orlandosentinel.com/2013-04-25/news/os-ucf-instructor-killing-spree-comment-20130425_1_killing-spree-ucf-spokesman-chad-binette-rosen-college.
[122] *Ibid.*

professor was reinstated a couple of weeks later, without having to complete the mental health examination.[123]

University of Colorado at Boulder

In 2004, an effort to satirically explain university affirmative action policies was faced with threats of censorship at the University of Colorado at Boulder. CU's College Republicans and Equal Opportunity Alliance, along with Republican state senator Ed Jones, made plans to host an "affirmative action bake sale" on campus with prices that they believe reflected racial discrimination congruent with race-based acceptance policy in college admissions and hiring. Baked goods were priced at $1 for white and Asian students, 50 cents for Latinos, 25 cents for African Americans and free for Native Americans. [124]"My background should not define my ability to succeed, and I refuse to see the color of my skin as an obstacle that needs to be accounted for by others," Jones told The Colorado Daily. "While I do agree that disadvantaged students often need a helping hand, I refuse to define that category of students based on skin color."

Despite College Republicans Chair Brad Jones saying that the point of the bake sale was to foster discussion and make a statement about a perceived injustice and not to make money, CU Vice Chancellor for Student Affairs Ron Stump cited Colorado General Statute 24-34-60 and the 1964 Civil Rights Act as laws the sale would infringe on, as one cannot offer goods or services at varying rates to customers based on race.[125] The Student Affairs Office ordered the bake sale to halt, and Robert Corry, CU's College

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[123] Adkins, S. "UCF instructor reinstated following suspension over 'killing spree' comment." *The University Herald,* May 22, 2013. http://www.universityherald.com/articles/3283/20130522/ucf-instructor-reinstated-following-suspension-killing-spree.htm

[124] Balink, M. "Will students buy at the 'bake sale'?" *The Colorado Daily,* February 9, 2004.

[125] *Ibid.*

Republicans' attorney, quickly threatened to take the university to court to protect the students' First Amendment rights.[126]

Undoubtedly looking to avoid the negative press and the financial burden of a lawsuit, CU and the College Republicans reached a compromise with the bake sale: prices would be fixed, but a "suggested donation" that varies based on race is permissible. "We're glad the university has backed off of its anti-First Amendment stance," said Jessica Peck Corry, director of the Campus Accountability Project, an advocacy group associated with the campus Republicans. "These students are clearly using political satire to demonstrate the evils of racial preferences. They aren't trying to make money, but rather draw awareness to the issue at hand."[127]

Angry students formed a mob and surrounded the protestors, blocked their demonstration, vandalized their display and physically jostled members of the College Republicans.[128] In this case, we see the interesting paradigm frequently witnessed when "the wrong opinion" is displayed on campus. The university offered no protection for the students and did not threaten to punish the protestors for intimidation. This appears to reinforce the notion that the university does not protect speech it does not approve of in the first place. While the College Republicans' speech could potentially pass as incitement not protected by the Constitution, it could be hypothesized that a liberal definition of "offensive speech," coupled with encouragement from administrators or

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[126] "Students fight ban on 'action' bake sale." *The Denver Post,* February 10, 2004. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/4264_2547.pdf.
[127] Crowell, K. and Heiser, S. "CU GOP fights off administration for affirmative action bake sale." *The Colorado Daily.* February 11, 2004. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/4641_2775.pdf.
[128] Foundation for Individual Rights in Education. "The intimidating atmosphere for free speech on campus." February 19, 2004. http://www.thefire.org/the-intimidating-atmosphere-for-free-speech-on-campus/.

other organizations in power, would be enough to drive the mob to take action beyond what a reasonable, objective person would pursue.

No discussion of First Amendment rights at the University of Colorado at Boulder would be complete without discussion of a pair of incidents involving former professor Ward Churchill. Churchill wrote an infamous essay in 2003 titled "Some People Push Back: On the Justice of Roosting Chickens," wherein he called victims of the September 11, 2001, terrorist attack "Little Eichmanns," after Nazi holocaust bureaucrat Adoph Eichmann, and insinuated that America deserved the attacks and needed more like them.[129] The vast majority of Americans who read the piece were offended at Churchill's extreme view, and Churchill stepped down from his position as CU ethnic studies chair in early 2005.[130] A couple of days later, the CU Board of Regents issued a statement: "Within the next 30 days, the Office of the Chancellor will launch and oversee a thorough examination of Professor Churchill's writings, speeches, tape recordings and other works," to determine whether Churchill's conduct, including speech, was valid for dismissal under the First Amendment. Churchill was also accused of academic fraud, but to remain consistent and focused, that part of the case will not be discussed at length.[131]

In a letter to the CU Board of Regents, FIRE president Greg Lukianoff referenced numerous court precedents, including the previously discussed *Papish* and *Sweezy*, as prohibiting Churchill's removal for the content of his speech. He also reiterated that all forms of speech should be protected, even those that the community at large finds

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[129] Churchill, W. (2003). *Some People Push Back: On the Justice of Roosting Chickens."* Oakland, CA: AK Press.
[130] Lukianoff, G. (2005) "FIRE letter to University of Colorado at Boulder Interim Chancellor Philip P. DiStefano." Retrieved at: http://www.thefire.org/fire-letter-to-university-of-colorado-at-boulder-interim-chancellor-philip-p-distefano-february-9-2005/.
[131] *Ibid.*

supremely abhorrent. Lukianoff writes, "[W]hatever contempt I may have for Professor Churchill's opinions, I believe it would be tragic if this incident were allowed to erode one of the most beautiful and fundamental principles of American society: free speech."[132]

In March of that year, the faculty committee that reviews misconduct at the University of Colorado at Boulder decided not to punish Churchill for the content of his 2003 essay full of anti-American sentiments. He would, however, continue to be under investigation for his allegations of plagiarism and other academic misconduct.[133] It is important to note, however, that though while plagiarism is never legally protected, the query into Churchill's academic integrity seems to have been a direct result of his controversial speech, and that sufficient "dirt" needed to be found by CU administration before they could legally terminate him.

In 2007, by an 8-1 vote, the CU Board of Regents terminated Ward Churchill on the basis of plagiarism, fabrication, improper citation and falsification, after an investigative committee released a 124-page document on Churchill's misconduct.[134] The litigious journey was just beginning, for Churchill, however, and he sued the University of Colorado at Boulder for wrongful termination, arguing that he was actually being fired because of his unpopular speech. A parallel used by Churchill's colleague asked, "If a police officer didn't like a car's bumper sticker, could the officer pull over the driver for speeding if the driver truly was speeding?"[135] The Colorado Supreme Court upheld

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[132] *Ibid.*
[133] Jaschik, S. "Churchill wars continue." *Inside Higher Ed.*, March 28, 2005. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/5481_3779.pdf.
[134] Lukianoff, G. "Ward Churchill fired: What's next?" *The Huffington Post*, July 25, 2007. http://www.huffingtonpost.com/greg-lukianoff/ward-churchill-fired-what_b_57831.html?.
[135] Jaschik, S. "Final loss for Ward Churchill." *Inside Higher Ed.,* April 2, 2013.

previous decisions that Churchill's firing was legal and not as a result of constitutionally protected speech. In 2013, the U.S. Supreme Court denied to hear his appeal.[136]

This wasn't the only time Ward Churchill was involved with a First Amendment issue at the University of Colorado at Boulder. In 2009, he was slated to appear at a speech on campus sponsored by Students for True Academic Freedom, the Student Environmental Action Coalition and 180 Degree Shift at the 11th Hour, with former Weather Underground member Bill Ayers.[137] To assuage the higher cost of security for the controversial event, CU notified the speakers and their sponsors after the event that they would bill $2,200 for security at the event, saw little disruption.[138] Left unchecked, this would effectively allow CU to charge organizations strange fees as a tax on speech that could be controversial, unpopular or unwelcome. FIRE again got involved, and president Greg Lukianoff wrote the school, saying, "Charging for extra security because of a potentially hostile audience grants the most disruptive or violent hecklers a veto over controversial events and creates an incentive for that kind of behavior. It's also unconstitutional at a public college or university."[139] Facing media scrutiny and additional lawsuit threats from Churchill, CU administration agreed to absorb the costs of security.[140]

University of California at Los Angeles

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[136] *Ibid.*
[137] "Ward Churchill's attorney: CU fee for Bill Ayers visit unconstitutional." *The Associated Press*. February 26, 2009. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/99ff0298fa14e9c444335e86f0d5c254.pdf.
[138] Foundation for Individual Rights in Education. "Controversial speakers face huge security fees at Berkeley and Colorado." March 17, 2009. http://www.thefire.org/controversial-speakers-face-huge-security-fees-at-berkeley-and-colorado-2/.
[139] *Ibid.*
[140] *Ibid.*

Six years after Matthew Walston came under university sanctions at the University of Central Florida for his post on Facebook, a student at the University of California at Los Angeles faced a similar media scandal for her dealings with social media – though by 2011, the Internet outrage machine on YouTube was more advanced than private Facebook groups in 2005, and bigoted speech on social media routinely makes national news.

UCLA student Alexandra Wallace posted a two-and-a-half minute video rant on YouTube about Asian students talking loudly on their cell phones in the library and inviting their extended families to shop, cook and do laundry at Wallace's apartment complex.[141] The video quickly gained traction, and Wallace removed the video from her site, though copies were available to view at various places around the Internet.

UCLA chancellor Gene Block wrote in an email to students, "I am appalled by the thoughtless and hurtful comments of a UCLA student posted on YouTube. Speech that expresses intolerance toward any group of people … is indefensible and has no place at UCLA."[142] Dean of students Robert Naples called Wallace's video "beyond distasteful," which indeed it was, but then followed that statement with, "We'll be taking a look at the language that she uses in the video to see if it violates any codes under the student code, perhaps regarding harassment."[143]

Wallace apologized to the campus community in a statement, and reported that she was receiving death threats from people who were offended by the video, and she

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[141] Parkinson-Morgan, K. "UCLA student's YouTube video 'Asians in the Library' prompts death threats; violent responses criticized as equally damaging." *The Daily Bruin,* March 14, 2011. http://dailybruin.com/2011/03/14/ucla_student039s_youtube_video_039asians_in_the_library039_prompts_death_threats_violent_responses_c/.

[142] *Ibid.*

[143] Mashood, F. and Parkinson-Morgan, K. "Viral YouTube video called 'repugnant' by UCLA administration." *The Daily Bruin,* March 13, 2011. http://dailybruin.com/2011/03/13/viral_youtube_video_called_repugnant_by_ucla_administration/.

notified campus police, who advised her on precautions to take to stay safe in what had become a hostile environment. She also had to reschedule her finals for that semester.[144] On hearing of Wallace receiving death threats, Naples commented that "If she's received a death threat, I find that as deplorable as her original YouTube video. If this is the response of students on campus, we've got a lot of work to do."[145] What is really deplorable here is that Naples is comfortable with equating death threats – true harassment not constitutionally protected – with speech someone merely found distasteful or offensive. As expected, though, Wallace was the one investigated while no further look was taken into those who threatened her.

The Los Angeles Times reported that UCLA's conduct code "prohibits students from making threats and bans racial or sexual harassment so severe or pervasive that it impairs another's participation in campus life."[146] This code, like others, could be bolstered by a stronger definition of "so severe or pervasive." The policy could be more permissible if it included the essence of *United States v. O'Brien,*[147] which established the need for substantial governmental interest in censoring speech. However, the content of Wallace's rant aligned more with speech containing a distasteful opinion, rather than a true threat likely to make thousands of Asian students fear for their wellbeing.

Thusly, UCLA administration declined to find the code inappropriate. It did, however, decide Wallace's video did not infringe the code, and the investigation against her ceased. She did drop out of school, though, due to the death threats. Fighting

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[144] Parkinson-Morgan, K. "UCLA student's YouTube video 'Asians in the Library' prompts death threats; violent responses criticized as equally damaging."
[145] *Ibid.*
[146] Gordon, L. and Rojas, R. "UCLA won't discipline creator of controversial video, who later withdraws from the university." *The Los Angeles Times,* March 19, 2011. http://articles.latimes.com/2011/mar/19/local/la-me-ucla-speech-20110319.
[147] *United States v. O'Brien*, 391 U.S. 367 (1968)

offensive speech or incorrect opinions with other speech is certainly permissible and encouraged, as many students and community members did with their "response" videos to Wallace's on YouTube. If she had dropped out because of her regret or embarrassment over the video, that would be one thing, but when she is run off campus in fear for her safety, discourse and free speech have failed.

A couple of years prior to Alexandra Wallace's case, the University of California at Los Angeles employed a different method in attempt to quell protected speech by a discontented student. In 2009, UCLA graduate student Tom Wilde created a website, ucla-weeding101.com (which is no longer active in 2014), documenting his removal from the Graduate School of Education.[148] Wilde claimed that he was dismissed for speech critical of the university, though the university claimed that he was removed due to low grades. Advisers for Wilde, however, confirmed that some of his grades were improperly recorded.[149]

After the website was created, Wilde received a letter from senior campus counsel Patricia Jasper, which said the website address was "trademark infringement and dilution" and that "commercial use of any of the names of the University of California" is "a criminal offense under California Education Code, §92000." UCLA also said it needed to protect its reputation, and that Wilde's poorly designed site could be confused as one of UCLA's own.[150] Jasper demanded Wilde take the website down. Not completely in compliance, Wilde included a disclaimer at the bottom of his page, which said "Disclaimer: This site is not supported, endorsed, or authorized by UCLA or the

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[148] Wilde, T. (2009) "Weeding 101: Introduction." August 13, 2009. Retrieved at: http://d28htnjz2elwuj.cloudfront.net/pdfs/456945cc05d48be4d1b0c32506006ec9.pdf.
[149] Foundation for Individual Rights in Education. "University to student: Take down that website!" August 22, 2009. http://www.thefire.org/university-to-student-take-down-website/5/.
[150] *Ibid.*

University of California. The inclusion of "UCLA" in the domain name and site content is solely for the purposes of identifying this public university."[151]

Wilde contacted FIRE for help, which in a letter to Chancellor Gene Block said that it was nearly impossible for anyone to mistake Wilde's creation for an official website by the university. Soon thereafter, Jasper responded that the disclaimer now included on the site would be sufficient, and that the investigation was concluded.[152] UCLA's claim likely would have been laughed out of the courts as well, as simply mentioning a trademark name is hardly an offense, especially when it is used in comment or critique.

[151] Wilde, T. (2009) "Weeding 101: Introduction."
[152] Foundation for Individual Rights in Education. "Victory for free expression: UCLA drops unconstitutional threats against Internet speech; Online speech still threatened at Santa Rosa Junior College." August 21, 2009. http://www.thefire.org/victory-for-free-expression-ucla-drops-unconstitutional-threats-against-internet-speech-online-speech-still-threatened-at-santa-rosa-junior-college-2/.

Chapter Five – CONCLUSION AND SUGGESTIONS FOR FURTHER RESEARCH

Free speech at American universities, in academia, and, potentially, for all citizens could be in its twilight years. As more students attend college, institutions of higher learning play an ever-broadening role in shaping societal norms. According to the National Center for Education Statistics, the number of undergraduate students in the nation was 17.7 million in 2012, an increase of 48 percent from 1990 and of 37 percent from 2000 to 2010. Enrollment is supposed to jump to 20.2 million students by 2023.[153] If the tendencies at many major universities continue, or become even more restrictive, free speech and the First Amendment face~~s~~ a serious threat. Alarming too, is that many students seem not to care. Mindless partisanship, uncritical thinking, and glorified echo chambers are the antithesis of what universities should be. As FIRE cofounder Alan Charles Kors says, "A nation that does not educate in liberty will not long preserve it and will not even know when it is lost."[154]

In order for the best ideas to prevail, all thoughts and opinions should be allowed and encouraged in our quest to better find truth. Elitist definitional establishment of allowed viewpoints does nothing but create a culture of assimilation, parroting of beliefs and belief in the authority to challenge and punish people who are different. By rewarding groupthink, punishing devil's advocates and shutting down discussion of important and relevant social and political topics, universities are doing exactly what they're supposed to prevent.

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[153] "Undergraduate enrollment 2013." *Worldofstatistics.org.* U.S. Department of Education, Institute of Educational Sciences, and National Center for Education Statistics. http://nces.ed.gov/programs/coe/indicator_cha.asp.
[154] Lukianoff, G. (2012) *Unlearning Liberty,* Loc: 328.

Outrage is often a legitimate feeling, but that outrage can be turned into inspiration to learn, to teach and to spend time considering an alternate viewpoint. The Constitution does not guarantee the right to keep individuals from being offended, though some people have found the ability to harness outrage to easily manipulate others into taking action or censoring others. When a culture of professional outrage is involved, accusations may as well be convictions wherein no legal innocence is sufficient.

The primary argument for the acceptance of speech codes is that universities and the government have a substantial interest in creating an environment where students feel comfortable. However, comfort is not necessarily constitutionally guaranteed (with exceptions on being threatened) when the First Amendment rights of others are being infringed. Epithets and offensive speech are not mutually exclusive; the mere utterance of one does not automatically infer the other. A person who makes a distasteful joke using the word "faggot" is not also advocating for harm to homosexuals. Neither, for that matter, is saying that "faggots should be hit," as the Supreme Court has ruled in *Brandenburg v. Ohio* that an actual threat must be made rather than just advocacy of harm. The same standard of threatening speech should be applied evenly across the board, not at a heightened state merely because one references someone different than his or her own preferences or genetic makeup. While arguing that decent, polite speech is necessary to the discourse hypothetically typical of an institution of higher learning to create substantial interest, simultaneously stifling unpopular opinions erodes discourse socially far beyond communities at the college level, thusly eroding the state of free speech.

A "model" university speech policy that is both accepted by students and administration while remaining constitutionally guaranteed would be an extensive – and perhaps futile – undertaking. This code would have to include solely provisions against speech so pervasive that it ceases to be mere speech, and then laws beyond the scope of the First Amendment are broken regardless. The speech would have to be content neutral, as discussed in *Ward v. Rock Against Racism*, and could not be regulated simply because it is unpopular. The rules themselves, as well as the punishments attached to them, would have to be well-defined, easily accessible and easily understood. Hiding them in an obscure manual with ambiguous terms of agreement does a disservice to due process and must be readily available to set the tone for what will be legally tolerated. Though *Cohen v. California* did not specifically reference learning institutions, it was found that overly vague prohibitions on speech – like those that research suggests are common in university speech policies – are impermissible.

The information, examples and discussion provided in this thesis could be bolstered and defined by additional information. A call for further research is necessary to continue to assess the landscape of speech codes at American universities, so that potential damages to freedom may be assessed and remedied. The research opportunities I recommend to foster additional comprehension of speech codes are as follows:

1. **Number of unreported incidents of university administration punishing students for speech.**

Essentially all cases the public is aware of involving sanctions against a student or faculty member for speech were brought into the open because the affected student reported it to the media or advocacy groups. However, how many students are unaware of

their rights, their ability to appeal, or the resources available in other venues to assist them with justice? How many students simply accept their punishment, or believe that they are truly guilty of a crime for their speech? A multitude of universities' records would have to be extensively examined to determine this number of dismissed students.

2. Reputation of universities enacting codes.

As previously discussed in the second chapter, Jon Gould conducted a survey in the 1990s that found the more prestigious the university, the more likely they were to employ speech codes. These universities typically "had experience anti-apartheid protest, maintained black or minority studies departments, sponsored gay/lesbian organizations, and enrolled graduate students and full-time undergraduates." He concluded that only approximately nine percent of universities actually did have unconstitutional codes, a much lower rate than FIRE claimed.[155] Today, though, nearly every major university could claim the qualities Gould said applied to "prestigious" universities in his study. Perhaps with these qualities applied again 20 years after the previous study, FIRE and Gould's statistics would more accurately align. Learning what types of universities are creating and enforcing codes as well as the number and scope of policies is paramount to correct advocating for change.

3. How much influence does prior education have on First Amendment expectations?

Despite the ruling in *McCauley* differentiating speech freedoms at the college level and that of K-12 programs, the two institutions still have bearing on each other. Though the U.S. Supreme Court ruled in 1969 that children do not lose their First

[155] Gould, J. (2005). *Speak No Evil*, p. 78.

Amendment privileges when they enter school,[156] public schools regardless have more leeway than universities at regulating speech. As previously stated, a majority of students entering their first year at college is unaware of the First Amendment provisions designed for protecting them. Further research may suggest that complacency is instilled in these students through approximately 13 years of heavy-handed regulation of speech. By the time young adulthood is reached, students expect uncomfortable speech to be regulated – and will advocate for its regulation. A further look into the role high school plays on First Amendment expectations is necessary to examine educational opportunities on student rights.

4. **What are the attitudes toward free speech and hate speech on campus? Do students want restrictions?**

Jon Gould and others talk about administrators refusing to abide by court decisions finding speech codes unconstitutional, but instead even creating offending ones. It could be suggested that the majority of students actually want these codes, that so many feel similarly about racist speech, for example, and actually want to punish those who use it regardless of legality. A nationwide survey of college students evaluating examples of offensive speech and remarking whether they believe the speaker should be punished would be useful in developing this statistic.

5. **How aware are students that speech codes exist, and can they interpret them and their First Amendment rights?**

Legalese can be difficult to understand, even for an educated person. This is especially true in a time when much focus in childhood education is on testing, placement and grades rather than understanding civic duties and guaranteed rights. Because codes

[156] *Tinker vs. Des Moines School District*, 393 U.S. 503 (1969)

are usually selectively and rarely enforced at any given university, how much of the student body is aware they exist? Almost certainly, a fraternity brother making a joke about Jews to his roommate behind closed doors is unlikely to result in expulsion. However, what happens when the same joke is made in the dining hall and is overheard? An updated survey on how familiar students are with the technical ins and outs of the First Amendment – and subsequently their rights in the face of punishment for expression at the university level – can aid scholars in getting a grasp on how influential education on the Constitution could be.

6. Is it too late?

Of course, all these measures will be for naught if academia has already ventured too far down the rabbit hole. If speech codes have become the pervasive, omnipresent culture at universities, anything but substantial and severe decisions and interpretations from the U.S. Supreme Court is unlikely to achieve any difference. With statistical assistance from the previously mentioned studies, a qualitative study into the efficacy, overall state and future of freedom of speech can be assessed. Ultimately, though the future of these and similar speech codes and policies, both on campus and in the public arena, depends on what rulings the courts will make. Will they find that there is an unquestionable and undeniable need to abolish speech codes, effectively eliminating the adversarial kangaroo courts apt to prosecute students and faculty for expression or opinions? Or will the First Amendment see serious revision, repeal or change in interpretation in the coming decades?

As in argument, debate and politicking to find truth or a pinnacle attitude of society, centuries of scholars and reason have suggested one method is most righteous

and fair: open exchange of ideas. The future and efficacy of the First Amendment lies with the next couple of generations. Will freedom of expression be preserved and persevere, or will some speech be found so vulgar it must be outlawed and punished completely? The stance that our institutions of higher learning take could be the most meaningful factor in ensuring change is brought about through cultural shifts, not coercion. Liberty must not be lost by those pledged to teach it.

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